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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DNA HEALTHCARE, INC.,

4 Plaintiff,

5 v.

15 Civ. 6086 (JSR)

6 DHRUV SIKKA and SIKKA
7 HOLDINGS, LLC,

8 Defendants.

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9 New York, N.Y.
10 August 14, 2015
11 11:30 a.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 APPEARANCES

16 ELIZABETH SHIELDKRET, ATTORNEY AT LAW

Attorneys for Plaintiff

17 BY: ELIZABETH SHIELDKRET

18 SCHWARTZ & THOMASHOWER, LLP

Attorneys for Defendants

19 BY: RACHEL SCHWARTZ

CARLA SERENY

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1 THE DEPUTY CLERK: Will the parties please identify
2 themselves for the record?

3 MS. SHIELDKRET: Elizabeth Shieldkret for the
4 plaintiff DNA Healthcare, Inc.

5 THE COURT: Good morning.

6 MS. SHIELDKRET: Good morning, your Honor.

7 MS. SCHWARTZ: Good morning, your Honor. Would you
8 prefer that I stay seated?

9 THE COURT: That's all right.

10 MS. SCHWARTZ: My name is Rachel Schwartz from the Law
11 Firm of Schwartz & Thomashower with my colleague Carla Sereny.
12 We are here for the defendants, Dhruv Sikka and Sikka Holdings,
13 LLC.

14 THE COURT: Good morning.

15 Before we get to the TRO, did you prepare a case
16 management plan?

17 MS. SCHWARTZ: Your Honor, Ms. Shieldkret and I
18 conferred last night, exchanged drafts and conferred again this
19 morning. We do have one with my handwritten notes on it.

20 May I read you the dates? And we have an application
21 with respect to it.

22 THE COURT: Hang on. Let me get out my copy. Okay,
23 first, is it jury trial or not?

24 MS. SCHWARTZ: I believe the plaintiff has requested a
25 jury trial.

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1 MS. SHIELDKRET: Yes, your Honor.

2 THE COURT: Does anyone anticipate any additional
3 parties?

4 MS. SHIELDKRET: We don't, your Honor.

5 MS. SCHWARTZ: We do not either, your Honor.

6 THE COURT: Amended pleadings without leave of Court?

7 MS. SCHWARTZ: The date that the parties have set is
8 11/8/16.

9 THE COURT: Oh no. No, no, no. The amended pleadings
10 without leave of Court is designed just to get at typing errors
11 or something like that. If you want to make substantive
12 changes, of course, that may or may not be contested.

13 MS. SCHWARTZ: Okay.

14 THE COURT: So, that will change that date to August
15 31st.

16 MS. SCHWARTZ: Your Honor, we have not yet filed our
17 answer which is due on August 31st and we, defendant has an
18 application with respect to that --

19 THE COURT: Yes.

20 MS. SCHWARTZ: -- for a three-week extension of our
21 time to answer.

22 THE COURT: Why?

23 MS. SCHWARTZ: Why? I will be out of town on the 31st
24 and I have two other briefs due before that. I am going to
25 Florida to visit my 87-year-old mother so that's why we have

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1 asked.

2 THE COURT: When are you leaving?

3 MS. SCHWARTZ: I am leaving on the 28th.

4 THE COURT: So what is going to happen between now and
5 the 8th?

6 MS. SCHWARTZ: Well, I am assuming that we are going
7 to be writing papers for preliminary injunction motion and I
8 have another summary judgment brief due.

9 THE COURT: When are you back?

10 MS. SCHWARTZ: I am back on September -- Labor Day.

11 THE COURT: So, I will give you to time to move -- or
12 answer is extended to September 18th.

13 MS. SCHWARTZ: Thank you, your Honor.

14 THE COURT: First request for production of documents.

15 MS. SCHWARTZ: We said 9/18/15.

16 THE COURT: Whoa, whoa, whoa.

17 You must know now, both sides must know now some
18 documents you want. This is only a first request, it doesn't
19 preclude later requests. Why don't we get that thing going
20 now?

21 MS. SCHWARTZ: Fine.

22 THE COURT: So, let's say August 21st. Ditto for the
23 very limited interrogatories under Local Rule 33.3A, which are
24 the only interrogatories I permit.

25 MS. SCHWARTZ: We appreciate that, your Honor. Thank

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1 you.

2 THE COURT: Does either side anticipate experts?

3 MS. SCHWARTZ: Yes, your Honor.

4 THE COURT: What kind of experts?

5 MS. SCHWARTZ: I believe that there will be an issue
6 with respect to whether my client's program has any of the
7 plaintiff's source code in it so there will at least be experts
8 with respect to that.

9 THE COURT: Okay.

10 MS. SCHWARTZ: I believe the plaintiff has others to
11 add.

12 THE COURT: Let me hear from plaintiff's counsel.

13 MS. SHIELDKRET: Yes, we are going to need a source
14 code expert and I'm not yet sure what language their code is
15 written in so it may be a technical problem finding someone
16 whom is familiar with both.

17 THE COURT: What date do you suggest?

18 MS. SHIELDKRET: We also need damages expert, your
19 Honor.

20 THE COURT: What dates did you suggest?

21 MS. SCHWARTZ: The dates we suggest, your Honor, were
22 January 15th, 2016 and February 12th, but they're keyed into
23 our.

24 THE COURT: No way. No way. Forget it.

25 Did you notice at the very top of the case management

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1 form I sent you it says, in boldface, In order to convey that
2 it is very serious, this Court requires that this case shall be
3 ready for trial on January 27th, 2016.

4 Now, that kind of timing I have applied in cases
5 involving dozens of parties, dozens of depositions,
6 international discovery, and you think you are going to escape
7 that here?

8 MS. SCHWARTZ: Well, that was my -- I wanted to be
9 very clear, your Honor, we did read that and our initial plan
10 was keyed off of that and then we discussed it. I have an
11 application with respect to that date which I would like to
12 make. I would prefer, it is something of a personal nature,
13 that it not be in open court and we be able to approach the
14 bench.

15 THE COURT: All right.

16 MS. SCHWARTZ: Thank you, your Honor.

17 (Pages 7-8 SEALED by order of the Court)
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(In open court)

THE COURT: So, we are back on the unsealed record.

We will move the ready-for-trial date six weeks so that instead of January 27th, that would be March 9th. Now, going back to experts, what are the dates you had in mind?

MS. SCHWARTZ: January 15th, and then for opening experts February 12th for reply experts.

THE COURT: Well, the proponent is going to be the plaintiff, right? So why do you need until January 15th for your expert reports to be ready?

MS. SHIELDKRET: Well, your Honor, I think there is -- we still don't know all of the experts that we could need. We really do need to get some more discovery and documents out of them. Our code is not -- one of the things I wanted to mention is a lot of our witnesses are not in the U.S. if they want to notice them up so that is going to be an issue.

THE COURT: That's an issue but it has nothing to do with experts.

MS. SHIELDKRET: Well, it has to do with getting the code -- getting the underlying fact discovery to be able to give it to an expert. So, we just wanted to build in that time so we didn't have to ask for more.

THE COURT: So, 1/15 and 2/11 was it?

MS. SCHWARTZ: 2/12.

THE COURT: 2/12, all right. All depositions

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1 including expert depositions to be completed by?

2 MS. SCHWARTZ: We thought it was the same day as the
3 case ready trial date; is that not correct?

4 THE COURT: Excuse me?

5 MS. SCHWARTZ: We weren't sure, is it the same as 3/9
6 or you do it earlier?

7 THE COURT: Of course not.

8 MS. SCHWARTZ: I wasn't sure, your Honor.

9 THE COURT: It sounds to me like it would be 2/19, a
10 week after the final expert report is received because by that
11 time I presume you have done all the depositions except for
12 that expert. So, request to admit January 19, all discovery to
13 be completed by February 19, moving papers on summary judgment
14 February 29th, answering papers by -- there is a February 29th
15 this year, by the way.

16 MS. SCHWARTZ: My nephew will be very happy.

17 THE COURT: Answering papers by March 11th, reply
18 papers by March 17th, and we will have a final pretrial
19 conference, let's look at March 24th.

20 THE DEPUTY CLERK: March 24th, a Thursday, is a trial
21 day with nothing after yet.

22 THE COURT: 4:00 p.m. on March 24th.

23 So, instead of the ready-for-trial date being March
24 9th it is really now going to be, you can further extend it to
25 March 24th but I consider that a very firm date.

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1 MS. SCHWARTZ: Thank you, your Honor.

2 THE COURT: So, I have signed the case management
3 plan, it will be filed electronically and therefore available
4 to both sides.

5 Now let's talk about the TRO. I will give the case
6 management plan to my courtroom deputy.

7 THE DEPUTY CLERK: Thank you.

8 THE COURT: So, as I understand it, plaintiff has a
9 non-compete agreement with the defendants and you believe that
10 despite assurances to the contrary, they are now competing and
11 soliciting clients that were or are yours; do I have that
12 right?

13 MS. SHIELDKRET: Yes, your Honor.

14 THE COURT: And, what is the response to that?

15 MS. SCHWARTZ: The response is two-fold, your Honor;
16 that the non-compete is unenforceable.

17 THE COURT: Why.

18 MS. SCHWARTZ: Why? The non-compete was backdated at
19 the plaintiff's insistence and it was drafted and presented --

20 THE COURT: Did the defendant agree to it?

21 MS. SCHWARTZ: May I tell your Honor what happened?

22 THE COURT: Well, yes, but you can answer my question.

23 MS. SCHWARTZ: The answer is my client showed up on
24 12/31 to pick up his final paychecks. He had resigned from his
25 position. He had a wife and child to support. They presented

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1 him with his independent contractor agreement and refused to
2 release his final checks which included a bonus check and his
3 last two weeks of paychecks unless he signed this agreement and
4 that they both signed it on that date, Mr. Sreeram Mantha and
5 my client after much discussion about how it was incorrect that
6 this was a bonus, that he was entitled to this money. They
7 refused to release the checks. He signed it and he left.
8 There will be documentary evidence that will show the
9 discussions leading up to that point that my client's version
10 of the facts is correct --

11 THE COURT: So legally, though, your claim is duress?

12 MS. SCHWARTZ: Well, I don't know that it rises to the
13 level of duress, your Honor.

14 THE COURT: So then what --

15 MS. SCHWARTZ: I think there is an absolutely no new
16 consideration for this agreement whatsoever. There was a
17 pre-existing obligation to pay the money. There is no
18 consideration even on -- so, there is no consideration and
19 certainly we think under the law there is no adequate
20 consideration. There is a two-week period and they're claiming
21 a 12 month non-compete and he worked for the plaintiff for four
22 years without any sort of employment agreement. In fact, he
23 refused to sign one twice.

24 THE COURT: So he was an employee at-will?

25 MS. SCHWARTZ: He was an employee at-will.

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1 THE COURT: But, he signed a contract and what did the
2 contract obligate them to do?

3 MS. SCHWARTZ: He had no new consideration for it.
4 They were required to pay him this money anyway. That's the
5 point. They were tricking him because there is a history, your
6 Honor, to the story, which I think will provide some context.

7 THE COURT: Okay.

8 MS. SCHWARTZ: My client started working for DNA
9 Healthcare in 2010. In June of 2014, very frustrated with the
10 failure to come back to him on compensation and to respond to
11 his request to become an equity owner in the company, he
12 announced to them that he was resigning, that he had an idea
13 for a multi-functional, interactive, care collaboration
14 platform called Notify which is the subject of the complaint
15 and this was in June and July of 2014, and that he had formed
16 another company and that he was going to leave their employ to
17 pursue this. There were negotiations which are documented,
18 your Honor, between the parties starting in July where they
19 acknowledged that he owned it, that he was permitted to work
20 with them while he also launched this and while they continued
21 to negotiate with respect to their desire to buy into his
22 company, to get a piece of the software so that they would have
23 some percentage ownership, and they continued to negotiate over
24 the next many months. Those negotiations are documented. They
25 stalled, they restarted, my client was growing increasingly

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1 frustrated. And let me just back up, your Honor.

2 The reason that they didn't want him to resign, they
3 worked out this long, nine-month transition period, is because
4 DNA Healthcare had just gotten a new revenue cycle management
5 contract with Bronx Lebanon and they needed him to deal with
6 that.

7 In November my client really had sort of had enough.
8 He told them that he was leaving, he was resigning. He
9 tendered his resignation, I believe it was on November 20th,
10 2014, his last date was 12/31/2014. It was an agreement he
11 would stay on and they would pay him. There are documents
12 going back and forth about the bonus structure and how much he
13 was entitled to and they asked him to hold off announcing his
14 resignation to any of the clients.

15 There are continued negotiations on December 11th and
16 December 16th, the parties are exchanging proposals by which
17 they continue to work together, that one will buy -- my client
18 will buy into DNA, DNA would buy in and have a percentage of
19 Notify, that they would get some commission, a 6 or 7 percent
20 commission for sales of Notify to Bronx Lebanon and any other
21 DNA clients.

22 When those negotiations failed on the 16th, my client
23 sent out his resignation; he announced it. He was asked on
24 December 19th to turn in his laptop and all of his keys and to
25 return all of that and there is a document to show that he did

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1 it. And he was told to take the rest of the time off and he
2 arranged, via text message, to come in to pick up his final
3 check on the 31st whereby they presented this agreement.

4 Now, again trying to -- now they want to stop him from
5 competing with them in a business that they don't compete in.
6 And I think that's my second point, your Honor; that the
7 agreement is, we believe, is unenforceable for a number of
8 reasons and we --

9 THE COURT: So far you have only told me one which is
10 lack of consideration.

11 MS. SCHWARTZ: Lack of consideration. There is no
12 geographical restriction. It is vague as to what he can do.
13 And so putting aside that, those are the reasons, we do not
14 believe and we think that the evidence is going to show this
15 very squarely, these are not competing businesses.

16 DNA Healthcare is primarily, and if you look at their
17 website you see it, primarily an RCM. They deal with revenue
18 cycle management in the health care industry -- and I am just
19 learning this -- which means that they deal with billing and
20 coding and getting providers paid for the services that they
21 do. They mostly provide the platform through a subcontractor
22 to perform those services. They have -- and they do some IT
23 support. As part of that, at Bronx Lebanon they have Member
24 Tracker which is essentially a one-function application which
25 is an e-mail notification service that alerts a provider if one

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1 of the patients has been to see another provider. They are not
2 care collaborators, they do not work in that industry. My
3 client's platform is a, I think I said it, it is a
4 multi-functional, interactive, patient care collaboration
5 software platform that allows providers to communicate in
6 real-time and coordinate patient care.

7 What is very significant about this, your Honor, to
8 show that they're not competing in competing businesses, in
9 February of 2015 Bronx Lebanon sent out a request for proposal
10 to health IT providers in the industry looking for care
11 collaboration platforms. DNA Healthcare was not invited to
12 participate in that RFP and my client -- this is after he has
13 already left, spoke with Mr. Sreeram Mantha who is a principal
14 at DNA Healthcare and Mr. Mantha said, yes, we were not invited
15 to participate. We do not have that capability. We do not do
16 that.

17 My client was invited to participate in the RFP. He
18 didn't get it because he was too small. And they do very, very
19 different businesses. The platforms are completely different,
20 one is an RCM, primarily, and there is no claim that they have
21 this capability, completely different platforms. So, we do not
22 believe that even if the agreement is enforceable, your Honor,
23 that there is any breach and there certainly is no urgency with
24 respect to this. They've known about this for a long time
25 because my client has been referring RCM business to DNA

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1 Healthcare because he is not interested in pursuing that line
2 of business. His only focus is in building this care
3 collaboration platform which is totally different than what DNA
4 does. Now they are trying to stop it.

5 I think what is very important for your Honor to know
6 is that Mr. Sikka, my client, and Dr. Ram Kairam, had a very
7 personal relationship. My client was his protege, Dr. Kairam
8 was his mentor. On June 20, 2015 my client met with
9 Dr. Kairam. Dr. Kairam admitted that he had no ownership
10 interest in Notify. He told my client I don't care what you do
11 with Notify but what he said to him was: You are someone who
12 has bit the hand that fed you and you must face the
13 consequences. And he has made comments to that effect over the
14 course of the many months that he is angry at Mr. Sikka for
15 having developed this which he did on his own time outside the
16 scope of his employment, and which DNA Healthcare agreed to let
17 him do while working on parallel tracks and that's documented,
18 and that he is using this lawsuit to really shut down my client
19 who is a single, sole-proprietor who is trying to launch a
20 business who hasn't had a salary in eight years and we believe
21 that he is using this court case to stop him.

22 THE COURT: All right. I get the point of your
23 argument. Let me hear from your adversary.

24 MS. SHIELDKRET: Your Honor, there are obviously a lot
25 of facts in dispute here and there are a lot of things I think

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1 that are just inaccurate.

2 There was business that Mr. Sikka solicited before
3 Bronx Lebanon that was RCM business directly, in fact it was a
4 question of switching over a contract from my client to him.

5 The first thing is there is a signed contract here, it
6 is Exhibit 1 to the complaint, it is Exhibit 1 to the Mantha
7 declaration.

8 THE COURT: Bear with me just one second, I want to
9 look at that agreement.

10 MS. SHIELDKRET: Sure.

11 THE COURT: So it appears to be open-ended in terms of
12 the dates on which services are to be performed, yes?

13 MS. SHIELDKRET: I'm sorry the contract was --

14 THE COURT: This is the first time I have looked at it
15 so maybe I am missing it. It says: 20, Term of Agreement.
16 The term of this agreement shall commence from the date it is
17 executed by contractor -- the contractor being Mr. Sikka. All
18 terms and conditions shall remain in force during and in all
19 periods for which contractor services are provided to the
20 client under this agreement.

21 So, it doesn't say how long the agreement is for, does
22 it?

23 MS. SHIELDKRET: Yes, your Honor. In Appendix A what
24 defines the actual scope of the work that was to be done, it
25 has a start date of 12/16/2014 and an end date of 1/31/2014.

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1 THE COURT: Where is that?

2 MS. SHIELDKRET: That is the third page of the
3 document, appendix A.

4 THE COURT: Okay. So, I am looking -- I see.
5 Engagement period, start date 12/16, end date 12/31. So, it is
6 a grand total of 15 days.

7 MS. SHIELDKRET: Yes, your Honor.

8 THE COURT: That's, frankly, suspicious on its face.

9 MS. SHIELDKRET: So, what happened was Mr. Sikka came
10 to my clients and said I have been working as an employee but
11 I'm starting my own company. I would like to have, for the
12 year 2014, some income for my company against which I can
13 deduct expenses, will you put me on as a 1099 contractor
14 instead of as an employee. And they agreed. And it says right
15 here, he was paid \$18,000 for that two-week period. And as she
16 said, he didn't have to come in to work for that. So, there
17 was additional consideration for this contract. He received a
18 check --

19 THE COURT: So, first of all, is it your position this
20 was signed on the 15th or the 31st?

21 MS. SHIELDKRET: The 31st, your Honor. We agree with
22 that.

23 THE COURT: So it is, forgive me, a falsely backdated
24 contract but of course both sides at least in some sense agreed
25 to it. But that doesn't make it any less inaccurate. It

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1 doesn't say this would have been permissible that this contract
2 is executed as of the 15th, you sometimes see that. But, no,
3 it says this agreement is executed this 15th day and then both
4 sides, at the end sign it 12/15/14. Actually, that appears --
5 yes. So, assuming they both inserted that date they would both
6 be, I guess the term of art would be, liars. Both.

7 Now, the next thing is in return for this \$18,000 on a
8 1099 he is agreeing, assuming this is a valid contract, to a
9 non-compete for 12 months, right?

10 MS. SHIELDKRET: Correct.

11 THE COURT: So, what you are really saying if I
12 understand your position as opposed to your adversary's, your
13 position is he wasn't owed anything along the 31st?

14 MS. SHIELDKRET: He worked at the company as an
15 employee through, I believe, December 15th, and he was paid, I
16 believe, on normal payroll cycle for his work through the 15th.
17 And then for the rest of December he was paid on a 1099, an
18 additional --

19 THE COURT: But that was retro -- in retrospect he
20 worked during that two-week period without any arrangement
21 other -- had he resigned? No.

22 MS. SHIELDKRET: Yes, your Honor. Resigned on
23 November 20th, I believe.

24 THE COURT: I see. So, it was unclear what his status
25 was but he was performing -- how much was he paid per two

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1 weeks, previously?

2 MS. SHIELDKRET: That's in the papers, your Honor. I
3 believe his base salary was \$140,000 which would make a
4 two-week cycle \$2,900.

5 THE COURT: So he is getting a lot more --

6 MS. SHIELDKRET: I'm sorry, a week, \$2,900. A
7 two-week cycle would be almost \$5,800.

8 THE COURT: Roughly \$6,000, so you are saying he is
9 getting three times what he would have gotten if he was just
10 being paid for two weeks but maybe he was paid for more than
11 two weeks. What was the last check he received prior to this?

12 MS. SHIELDKRET: I believe it was December -- it was
13 through his work for December 15 and I believe it was done as a
14 payroll, may have been a direct deposit, not a check.

15 THE COURT: Okay. That's fine.

16 So, if he were paid through December 15th and then he
17 worked through December 31st, he would be entitled on a, if you
18 will, sort of quantum meruit approach, to \$2,900 is what you
19 are saying.

20 MS. SHIELDKRET: I'm sorry. I think I misspoke, but
21 like \$5,800.

22 THE COURT: That is what you say, pardon me. \$5,800.
23 Instead he is getting \$18,000.

24 MS. SHIELDKRET: Correct, your Honor.

25 THE COURT: And you are saying he is getting \$18,000

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1 so that he can deduct against that certain expenses, that's why
2 he wants it in the form of a 1099 --

3 MS. SHIELDKRET: That was our understanding.

4 THE COURT: -- or arguably a fraud on the IRS, but
5 maybe not.

6 And in return you are getting a one-year non-compete.

7 MS. SHIELDKRET: Correct, your Honor.

8 THE COURT: So, of course this agreement on its face
9 doesn't purport to be anything like that but we have competing
10 views of all that is really going on.

11 MS. SHIELDKRET: May I just give some factual
12 background there?

13 THE COURT: Yes.

14 MS. SHIELDKRET: My client had previously -- this is
15 someone who worked at the company for 10 years and was in
16 charge of day-to-day management of many matters at the company.
17 My client had, on other occasions, hired 1099 employees and had
18 agreements like this with them, with those employees. So when
19 he suggested himself, when he asked to be put on as a 1099
20 employee he knew what was involved, he knew that that was
21 customary at the company to have this kind of agreement with a
22 non-compete and he negotiated with them about it. It didn't
23 just happen. We have a disagreement about the idea that he
24 turned up and it was a take it or leave it proposition.

25 THE COURT: Who drafted the agreement?

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1 MS. SHIELDKRET: My understanding was that Mr. Mantha
2 presented him with an agreement. Mr. Sikka rejected it. They
3 negotiated and it went back and forth and Mr. Mantha put in
4 changes.

5 THE COURT: All right.

6 So, now what about this business that -- I think you
7 have already said that in your view he is directly competing
8 for some of your client's business?

9 MS. SHIELDKRET: Right. Well, he doesn't deny that he
10 is competing and --

11 THE COURT: Well, they're saying he is competing for
12 different business. He is not denying that he is negotiating
13 with one of your clients but what he is denying is that it is
14 the same business.

15 MS. SHIELDKRET: He admitted earlier this year that he
16 negotiated for the RCM business at Bronx Lebanon which was
17 directly competitive with my client. He has admitted that.

18 THE COURT: Admitted it in what form?

19 MS. SHIELDKRET: Admitted it to Dr. Kairam, and I
20 believe that is paragraph 10 of Dr. Kairam's declaration.

21 THE COURT: So, I don't see the need for any papers
22 here. I see a need for an evidentiary hearing because what we
23 are hearing is two very different versions of what went on and
24 what its effect was, and it is already obvious to the Court
25 that there will be credibility issues here and the Court, just

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1 on the basis of what it has seen already, has at least some
2 question in its mind about whether either of these folks is
3 capable of telling the truth. But, we will find out.

4 MS. SHIELDKRET: Your Honor, I would just like to
5 point out that the reason we brought this application was
6 because Mr. Mantha was at the client on Monday and saw a
7 proposal from Notify on the desk of a decision-maker at the
8 client. That's paragraph 20 of Mr. Mantha's declaration and
9 Ms. Schwartz' representation about my client's product is just
10 not true. They both perform the same function of notifying
11 care givers that someone has shown up and they're seeking other
12 care and the caregivers need to coordinate. What she is
13 talking about, the difference he claims --

14 THE COURT: So that's fine. So.

15 MS. SHIELDKRET: But.

16 THE COURT: Excuse me.

17 So, when is the earliest you would be ready for an
18 evidentiary hearing which, presumably, would involve your
19 client, maybe one of -- another witness to events and someone
20 from the entity that your adversary is negotiating with.

21 MS. SHIELDKRET: We submitted our papers this morning
22 and whenever your Honor can hear us.

23 THE COURT: I'm sorry. I didn't know that we had set
24 that schedule but let me ask my law clerk. Did we set a
25 schedule for papers?

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1 LAW CLERK: No.

2 THE COURT: I haven't seen your papers either.

3 MS. SHIELDKRET: I have a courtesy copy, your Honor.

4 THE COURT: But I didn't want papers. I thought we
5 would swiftly move to an evidentiary hearing. I thought that
6 would be what you would want; if in fact your allegations are
7 true that you want immediate relief.

8 MS. SHIELDKRET: We would like an evidentiary hearing,
9 your Honor, but we do want to stress that there is a time
10 component to this and we are asking for a TRO because --

11 THE COURT: That's why I didn't want papers, because
12 if, for example, you were ready to go forward with an
13 evidentiary hearing on Monday, then I was going to ask your
14 adversary whether her client would voluntarily agree to do
15 nothing between now and Monday night. Alternatively I could
16 order that. But I always prefer to -- and I don't want to have
17 him spend a busy weekend wasting his time if it turns out to be
18 a waste of time.

19 So, is your client willing to, in effect, have no
20 further negotiations, no conversations, nothing about this
21 whole business other than, of course, conversations with
22 counsel or any witnesses you need to line up between now and
23 close of business Monday?

24 MS. SCHWARTZ: Your Honor, we will voluntarily accept
25 that we need a little bit more time.

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1 THE COURT: Okay.

2 MS. SCHWARTZ: Yes.

3 THE COURT: The price of more time --

4 MS. SCHWARTZ: I understand.

5 THE COURT: It is the same agreement.

6 MS. SCHWARTZ: I understand. That's fine.

7 THE COURT: How much time would you like?

8 MS. SCHWARTZ: May I have a moment?

9 THE COURT: Yes, sure.

10 (Counsel conferring)

11 MS. SCHWARTZ: So, not next week, the following week?

12 THE COURT: Okay, let's look at Monday the 24th.

13 THE DEPUTY CLERK: That's a trial day, Fazio v.

14 Ranestorm, and actually you are supposed to be at the MDL panel
15 in Denver.

16 THE COURT: Oh yes. That's right.

17 MS. SCHWARTZ: Can we make it the Wednesday, your
18 Honor?

19 THE COURT: No. Well, maybe.

20 THE DEPUTY CLERK: You are back as far as calendar.

21 THE COURT: I am back on Wednesday?

22 THE DEPUTY CLERK: Yes, your Honor.

23 THE COURT: We don't start the other trial until
24 Thursday, the Lavastone trial.

25 THE DEPUTY CLERK: Lavastone, yes.

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1 THE COURT: You are in luck. So, Wednesday, August 26
2 at 10:00 a.m. I will, since the papers have been filed by the
3 plaintiff I will accept them, but given the short time frame,
4 defense counsel, if you want to put in papers you can but you
5 are not required to, you can do it all orally on the 26th, if
6 you prefer. So, it is totally up to you but if you want to put
7 in papers, put those in by the 24th so I will have a chance to
8 read them. But, we will in any event, have a hearing on the
9 26th at 10:00 a.m., and on consent the defendants are barred
10 from entering into any further negotiations or agreements with
11 any of the customers that plaintiff alleges are covered by the
12 non-compete clause until close of business on the 26th of
13 August.

14 MS. SHIELDKRET: Your Honor, may I ask that also cover
15 installing or running the software at the clients?

16 THE COURT: I'm sorry?

17 MS. SHIELDKRET: May I ask that that also cover
18 installing or running the software at the clients?

19 MS. SCHWARTZ: We understand the scope of the
20 injunction, your Honor.

21 THE COURT: Okay. All right.

22 MS. SCHWARTZ: We understand. We are standing still
23 on Notify.

24 THE COURT: Much appreciated.

25 MS. SCHWARTZ: Your Honor, with respect to documents

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1 at the hearing, do you want them to be premarked?

2 THE COURT: That would be nice, but I don't need to
3 see them in advance.

4 MS. SCHWARTZ: Okay.

5 THE COURT: If you want to provide them in advance,
6 that's fine too.

7 MS. SCHWARTZ: Okay.

8 THE COURT: I am going to be in Denver on the 24th and
9 25th. I will make sure I read any papers that you submit but I
10 probably won't have a chance to look at any exhibits, so.

11 MS. SCHWARTZ: I am on about the papers.

12 THE COURT: Very good. All right. We will see you on
13 the 26th.

14 o0o